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Offset

IN THE HON'BLE HIGH COURT OF CHHATTISGARH

AT : BILASPUR

SECOND APPEAL NO. 91 OF 2003.

valued Rs. 1500/-, C.F. affixed Rs. 150/-

APPELLANTS PLAINTIFFS : 1. Buddheshwar Singh, aged 76 years, son of Shri Shyam Sunder Singh,

2. Shashi Bhushan Singh, aged 52 years, son of Shri Shyam Sunder Singh,

Both residents of village - Podhishanker, Tehsil - Champa, District- Janjgir-Champa (Chhattisgarh),

3. Smt. Kashmira Bai, aged 54 years, daughter of Shri Shyam Sunder Singh, wife of Shri Sajiwan Singh, resident of village- Hardi, Tahsil-Janjgir, District- Janjgir-Champa(Chhattisgarh),

4. Bhanwar Singh, aged 52 years, son of Shri Manharan Singh, resident of village Siud, Tahsil-Janjgir, District- Janjgir-Champa (Chhattisgarh).

P. R. No. 28/1/03
Presented by Shri Somnath Verma
dated 01/02/03

V E R S U S

RESPONDENTS DEFENDANT : 1. Thakur Bhupendra Singh, aged 25 years, son of Shri Niranjan Singh Chandel, resident of village - Chhita Padariya, Tahsil - Sakti, District - Janjgir-Champa (Chhattisgarh), R1

2. State of Chhattisgarh, through the Collector, Janjgir - Champa (C.G.).

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SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, 1908.

HIGH COURT OF CHHATTISGARH AT BILASPUR

S.A. No. 91 of 2003

Appellants : Buddheshwar Singh and others.

VERSUS

Respondents : Thakur Bhupendra Singh & Anor.

Shri Somnath Verma learned counsel for the appellants.
Shri S.K.Agrawal, Advocate with Shri H.S.Patel, Advocate for respondent No.1.

ORDER

(Passed on 21-11-2005)

Dhirendra Mishra, J

The appellants/plaintiffs have preferred this second appeal against the judgment and decree dated 16.1.2003 passed by Additional District Judge, Janjgir district Bilaspur in Civil Appeals No. 21-A/2002 and 26-A/2002 arising out of original judgment and decree dated 22.3.2002 passed in Civil Suit No. 208-A/1996. The first Appellate Court however dismissed the Civil Appeal No. 26-A/2002 and allowed the Civil Appeal No. 21-A/2002 filed by respondent No.1 herein setting aside the judgment and decree passed in Civil Suit No. 208-A/1996.

2. The facts of the case in brief are that the plaintiffs filed a civil suit averring that they are the sons and daughters of late Shyam Sundar Singh who died in the year 1964. Dr. Bhanu Pratap Singh being the eldest son of late Shyam Sundar Singh was the Karta of the family who succeeded to the movable and immovable property after the death of his father. Partition had not taken place in their family. Dr. Bhanu Pratap Singh got the land of village Chhita Pandariya bearing Khasra No. 30, divided into two parts i.e. Khasra No. 30/1 area 5.27 acres and Khasra No. 30/2 area 30 acres and got the same recorded in his name without the knowledge of other heirs. He also purchased land in village Sarmani and Pondi Sankar in his

name through the sale proceeds of the joint property and he as well as the plaintiffs were in joint possession of the same. Dr. Bhanu Pratap Singh executed a registered will in favour of defendant No.1 with respect to his 1/3rd share of land recorded in their names jointly and sought a declaration that will dated 21.11.1989 is illegal, void and ineffective. A further declaration was sought to the effect that Dr. Bhanu Pratap Singh was entitled only for 1/5th share in the coparcenary property and perpetual injunction against defendant No. 1. Subsequently, by way of amendment another relief was alternatively prayed for with respect to the possession of the land bearing Khasra No.30, area 30 acres situated in village Chhita Pandariya.

3. The case of the defendants was that the land was partitioned by late Shyam Sunder Singh during his life time and in pursuance of the partition they were in possession over their respective shares. In land ceiling cases the plaintiffs Budhdeswar Singh, Shashi Bhusan and late Shyam Sundar Singh filed separate returns mentioning that each of them were allotted 30 acres of land in village Chhita Pandariya and since then they were in separate possession over their shares of land. However, they have deliberately suppressed this fact in their plaint. They had also sold lands of their shares to various persons in the year 1978.

4. The trial Court partly decreed the suit holding that the partition of the joint family had taken place during the lifetime of late Shyam Sunder Singh and the property purchased by Dr. Bhanu Pratap Singh was not purchased through the proceeds of joint family property. However, will dated 21.11.1989 was declared illegal and void with respect to 30 acres of land on the ground that wife of Dr. Bhanu Pratap Singh was alive at the time of execution of will and as there was no consent of his wife, the will was illegal and void in the absence of her consent. The plaintiffs as also defendant No.1 preferred first

appeal against judgment and decree of the trial Court and the learned first appellate Court vide impugned judgment and decree allowed the appeal of defendant No.1 and dismissed the suit. Will in favour of defendant No.1 was declared to be legal and valid. The appeal preferred by the plaintiff has b een dismissed.

5. Both the Courts below have arrived at the conclusion that the property was partitioned during the life time of late Shaym Sundar Singh who died in the year 1964 and since then all the share holders were in separate possession of their respective shares of land. The above finding is based on the oral as well as documentary evidence adduced by the respective parties as the witnesses examined by both the sides have supported their respective cases.

6. Courts below have also arrived at the conclusion that on the basis of revenue records where it has been established that all the three brothers were allotted 30 acres of land each in village Chhita Pandariya and they were the recorded owners of the same in the revenue record. Plaintiff – Buddheshwar Singh had sold his share of land to various persons on different dates. Similarly plaintiff Shashi Bhushan Singh was also allotted 30.62 acres of land in village Chitta Pandariya and some part of it he sold to various other persons. The plaintiffs had deliberately suppressed this fact as they have not described the land allotted in their share, in schedule - A and Schedule – B to the plaint and on the basis of above oral as well as documentary evidence both the courts below have recorded a concurrent finding of fact that late Bhanu Pratap Singh had obtained the land bearing Khasra No. 30/2 area 30 acres in his share in the partition and the partition was effected before 1954 during the life time of late Shyam Sundar Singh.

7. Both the Courts below have also arrived at the conclusion that Dr. Bhanu Pratap Singh purchased the land in village Pondi Shankar and Sarmani out of his personal earning as he was doctor by profession. The Courts below have also held that Khasra No. 30/1 area 5.27 acres in village Chitta Pandariya was recorded in the name of Buddheswar Singh, Shashi Bhushan and Dr. Bhanu Pratap Singh. Late Bhanu Pratap Singh had 1/3 share in the above land situated at village Chhita Pandariya.

8. Learned Appellate Court allowed the appeal preferred by the defendant No.1 and held that the will executed by Bhanu Pratap Singh in favour of the defendant No.1 was legal as the execution of the will has not been challenged by the plaintiffs and his wife namely Ajab Bai and in the absence of any challenge from the side of wife the plaintiffs cannot challenge the will and thus on this ground.

9. Learned counsel for the appellants has vehemently challenged the findings of both the Courts below on the following grounds:

   (a) It is not disputed that apart from three sons late Shyam Sundar Singh had two daughters namely Kashmira Bai and Sushilabai and plaintiff No.4 namely Bhanwar Singh is the son of Sushila Bai. In this case, it was the onus of defendant No.1 to prove the fact that the partition took place in the life time of late Shyam Sundar Singh. However, since the defendant has not entered into witness box and there is no evidence on record to show that in the alleged partition what share was allotted to Kashmira Bai and Sushila Bai, it cannot be presumed that

partition took place between the coparceners of the joint property. It is further argued that the will is illegal and void as 1/3 share has been bequeathed to the defendant No.1 from the property recorded jointly. As per the Hindu Law daughters are also entitled for partition and Dr. Bhanu Pratap Singh was entitled only for 1/5 share and not for 1/3 share. In pursuance of this contention learned counsel for the appellants placed reliance in the judgment of the Supreme Court in the matter of **Mahila Bajrangi (Dead) through LRs and others Vs. Badribai W/o Jagannath** and another reported in **2003 AIR SCW 129** and in the matter of **Madanlal (dead) by LRs and others Vs. Yoga Bai (Dead) by LRs. Reported in AIR 2003 SC 1880.**

(B) Learned counsel for the appellants apart from other substantial questions of law has proposed the one, such as – whether adverse presumption should not have been drawn against the defendant No.1 for not presenting himself as a witness during trial and whether only on the basis of mutation in revenue records, the partition between the parties can be inferred as valid and whether testator Bhanu Pratap Singh was entitled for 1/3 share over the ancestral property and whether non allotment of any share to his sisters can make the partition legal as per

the provisions of Hindu Succession Act, 1956.

10. Both the Courts of facts have based their findings on the fact that the partition took place between the parties on the documentary evidence adduced by the respective parties. The instant suit is admittedly not the suit for partition. It is not even the case of the plaintiffs that the partition effected in the family was inequitable and that it was illegal and void because no share was allotted to the sisters of Dr. Bhanu Pratap Singh. By the instant suit the plaintiffs have sought declaration that the will executed by Dr. Bhanu Pratap Singh in favour of defendant No.1 is illegal and in-operative as there was no partition in the family. Thus in the aforesaid circumstances the contention of the learned counsel for the appellants/plaintiffs that simply on the basis of revenue records or on the basis of the fact that 30 acres of land was allotted to the share of all the three brothers each it cannot be presumed that there was partition in the family, is not tenable. The finding of both the Courts below regarding partition in the family is a concurrent finding of fact which is based on proper appreciation of oral and documentary evidence available on record and the same cannot be interfered with in the second appeal. Similarly, it was the onus of the plaintiffs to establish by cogent evidence that there was no partition in the family. However, the plaintiffs have deliberately suppressed the material fact in their plaint that they were also allotted 30 acres of land each to their respective shares and as such both the Courts below have rightly not accepted the version of the plaintiffs and held that partition of land was effected by late Shyam Sundar Singh during his life time.

11. Once it is established that the property was duly partitioned and further that Dr. Bhanu Pratap Singh had executed a will in favour of defendant No.1 and the same was not challenged by

the wife of the testator, the will executed in favour of the defendant is legal and executable. So far as judgment of the Supreme Court in the matters of Mahila Bajrangi (supra) cited by the plaintiffs is concerned, it has been held by the Supreme Court in that matter that only on the basis of statement recorded in mutation proceedings in the absence of independent corroboration, the factum of partition cannot be established. However, in the present case, apart from copies of revenue papers there are other documentary evidences such as sale deeds, returns filed by the parties to establish that the partition was effected between the share-holders. Similarly, in the matters of Madan Lal (supra) the Supreme Court has held that property raised and developed by joint efforts of the members of a family is a joint family property and is amenable for partition. However, in the present case, both the Courts below have arrived at the conclusion that partition took place before 1954 and the property was purchased by Dr. Bhanu Pratap Singh through his personal earning as he was doctor by profession and since there is no evidence in rebuttal adduced by the plaintiffs, the above cited case law is not applicable in the present case.

12. In view of the aforesaid discussion, I am of the considered view that there is no illegality in the impugned judgment passed by learned first appellate court and more so, no substantial question of law is involved for adjudication of this appeal. Accordingly, the appeal being substance-less is hereby dismissed at the motion stage itself.

13. There shall be no orders as to cost.

Sd/-
DHIRENDRA MISHRA
Judge